

1 THE HONORABLE BENJAMIN H. SETTLE

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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 UNITED STATES OF AMERICA,  
11  
12 Plaintiff,  
13 vs.  
14 BHAVESH PATEL,  
15 Defendant.

Case No. 18-CR-5264-BHS  
  
DEFENDANT’S RESPONSE TO  
GOVERNMENT’S MOTION  
FOR LEAVE TO DISMISS  
INDICTMENT

16 The Defendant, Bhavesh Patel, by his attorney, Angelo J. Calfo, hereby files this  
17 response to the government’s Motion for Leave to Dismiss Indictment (“Motion”).

18 **I. INTRODUCTION**

19 As with many prosecutions under the Computer Fraud and Abuse Act (“CFAA”), proper  
20 venue in this case may lie in multiple districts. Mr. Patel was first indicted for intentional damage  
21 of a protected computer in the Western District of Washington on May 30, 2018, following a  
22 Complaint filed on May 9, 2018. He has been represented by undersigned counsel in this matter  
23 since May of 2017. Yet after Mr. Patel decided not to enter into a tolling agreement with the  
24 government related to the statute of limitations for an aggravated identity theft offense, the  
25 government responded by indicting Mr. Patel for both intentional damage to a protected

1 computer and aggravated identity theft in the Eastern District Texas. The government never  
2 requested Mr. Patel's consent and cooperation in maintaining venue in the present District for  
3 the additional charge, as the DOJ Manual suggests is appropriate under such circumstances.<sup>1</sup>  
4 The government now insists upon continuing the prosecution of this matter in the Eastern District  
5 of Texas, despite Mr. Patel's willingness to waive any objections to venue in the Western District  
6 of Washington for all charges on which he has been indicted. This results in a "substantial  
7 balance of inconvenience" to Mr. Patel and is plainly unfair. Mr. Patel intends to file a motion  
8 to transfer the Texas Indictment back to the Western District of Washington under Federal Rule  
9 of Criminal Procedure 21(b) and "in the interest of justice."<sup>2</sup> In the meantime, the government's  
10 machinations with respect to venue in this case should be made part of the record.

## 11 II. ARGUMENT

12 Mr. Patel, who lives in South Dakota, hired undersigned counsel to represent him in  
13 connection with this matter over a year ago, in May of 2017. He selected and retained Seattle-  
14 based counsel because the FBI agent handling the government's investigation in this case,  
15 Special Agent Michael D. Brown, was and is based in Tacoma. Throughout this time,  
16 undersigned counsel was occasionally in contact with Assistant United States Attorney Norman  
17 Barbosa. The government ultimately filed a complaint against Mr. Patel in the Western District  
18 of Washington on May 9, 2018, Dkt. 6, and Mr. Patel made his initial appearance in this District  
19 on May 21, 2018. Dkt. 7. A Grand Jury returned a superseding indictment against Mr. Patel in  
20 this District on May 30, 2018 for one count of intentional damage to a protected computer under  
21 18 U.S.C. § 1030(a)(5)(A) and (c)(4)(B)(i)(I), (II), (IV), and (ii). Dkt. 10 at 4.

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23 <sup>1</sup> See *Prosecuting Computer Crimes*, Computer Crime and Intellectual Property Division, OLE Litigation Services  
24 (2014), 117, <https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ccmanual.pdf> (referred  
to herein as "DOJ Manual").

25 <sup>2</sup> See Fed. Rule. Crim. P. 21(b) ("Upon the defendant's motion, the court may transfer the proceeding, or  
one or more counts, against that defendant to a district for the convenience of the parties, any victim, and the  
witnesses, and in the interest of justice.").

1 Since Mr. Patel's arraignment, this Court has issued deadlines for pretrial motions and  
2 set trial for June 18, 2019. Dkt. 26. The parties conferred and agreed upon this trial date, based  
3 in part on the complex nature of the evidence at issue in this case, as well as undersigned  
4 counsel's commitments in other matters. The government has produced significant discovery  
5 thus far, including a terabyte hard drive containing tens of thousands of pages and data files, two  
6 forensic reports at issue in a pending *in camera* submission upon which the Court has yet to rule,  
7 and a production as recently as August 17, 2018 containing over 18,000 pages of additional  
8 discovery. This Court has denied the government's Motion to Seal certain filings and held a  
9 hearing regarding the scope of a potential protective order. The Court has not yet ruled upon the  
10 government's Submission Regarding Protected Material, Dkt. 33, and Patel's Response to  
11 Government's *In Camera* Submission, Dkt. 36, which relate to burdensome restrictions the  
12 government has placed upon Mr. Patel's ability to review the discovery produced in this case  
13 from his home in South Dakota.<sup>3</sup>

14 On August 10, 2018, the government unexpectedly informed Mr. Patel's counsel that a  
15 Grand Jury in Sherman, Texas had returned a superseding indictment against him for intentional  
16 damage to a protected computer and aggravated identity theft. The government's Motion  
17 indicates that it "informed defense counsel that it was evaluating certain additional charges in  
18 this case, including Aggravated Identity Theft, which it planned to charge before the statute of  
19 limitations expired on August 16, 2018." This is misleading: it omits the crucial fact that the  
20 government never offered Mr. Patel the opportunity to consent to venue in this District for the  
21 additional aggravated identity theft charge before indicting him in Texas, nor did it inform

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22 <sup>3</sup> The defense's briefing on this issue included the Declaration of Eric Blank, a computer expert intimately  
23 familiar with the Epic software and Unix programming language at issue in this case. Mr. Blank submitted that  
24 the government's purported justification for preventing Mr. Patel from viewing the forensic reports was not  
25 grounded in fact. The Court has yet to issue a ruling upon this issue; accordingly, Mr. Patel remains unable to  
view even the redacted versions of the government's forensic reports outside the presence of counsel, even when  
the government has conceded through its partial redactions that a substantial portion of those reports are not  
protected material.

1 defense counsel that it was considering referring the case to the Eastern District of Texas. To be  
2 precise, the government did inform counsel via email that it planned to present a superseding  
3 indictment, including a charge of aggravated identity theft under Section 1028A, in July 2018  
4 “in part due to the statute of limitations in this case.” *See* Ex. A (7/5/18 Email from AUSA S.  
5 Velamoor to A. Calfo). However, the government went on to state that its practice was not to  
6 remove aggravated identity theft from any future plea agreement once charged, and, that

7 [w]hile we believe that this case clearly falls within the heartland of  
8 the aggravated identity theft statute and its Congressional purpose,  
9 I anticipate that there may be reasons (e.g., equitable factors  
10 regarding Mr. Patel’s characteristics and the circumstances of the  
11 offense, and/or the victim’s interests under the CVRA) for why  
12 avoiding the costs and publicity of a trial may justify a plea  
13 agreement that does not include that offense. In order to keep that  
14 possibility open, while still giving you and Mr. Patel adequate time  
15 to evaluate the case, I’m letting you know that we are amenable to  
16 postponing our superseding-indictment presentation, provided that  
17 you enter into a tolling agreement (of, say, 3 months).

18 *Id.* The parties were not able to reach an agreement as to the terms of a potential tolling  
19 agreement. The government’s indictment of Mr. Patel on the additional aggravated identity theft  
20 charge in Sherman, Texas followed soon after, without any notice as to the change in venue.

21 Under these circumstances, the government’s abrupt change in venue reeks of pretext.  
22 According to the Motion, the government purportedly decided to pursue charges in Sherman,  
23 Texas based on its recent “determin[ation] that this District likely does not have venue over  
24 additional charges arising out of the Defendant’s [alleged] conduct, including Aggravated  
25 Identity Theft . . . and other acts of intentional damage[.]” But the government provides no legal  
rationale for this determination. Moreover, federal courts have held that venue properly lies with  
respect to an aggravated identity theft offense in any district in which venue lies for the predicate,  
even when there is no evidence that the defendant “transferred, possessed, or used another  
person’s means of identification within that district.” *See United States v. Magassouba*, 619 F.3d

1 202, 206 (2d Cir. 2010); *United States v. Petty*, No. 3:14-CR-498-M, 2018 WL 461128, at \*3  
2 (N.D. Tex. Jan. 17, 2018) (“Because the commission of a predicate felony offenses is an essential  
3 element of a section 1028A offense, the Court concludes that venue properly lies with respect to  
4 an aggravated identity theft offense in any district in which venue lies for the predicate.”). The  
5 government does not even attempt to explain why venue in this District is suddenly improper for  
6 the aggravated identity theft charge at issue here, when it previously determined that this District  
7 was a proper venue for indicting the predicate offense of intentional damage to a protected  
8 computer.

9 In fact, the Texas Indictment is essentially identical to the Washington Indictment, but  
10 for the removal of certain references to this District, and selective references to aspects of alleged  
11 conduct over which it now alleges the Eastern District of Texas has venue. *Compare* Washington  
12 Indictment (attached herein as Exhibit B) at ¶ 1 (“the [alleged] Victim Hospital in this case was  
13 a Washington non-profit health services company that operated five hospitals and medical  
14 centers in the South Sound area of Washington State”) *with* Texas Indictment (attached herein  
15 as Exhibit C) at ¶ 1 (the [alleged] victim . . . operated hospitals and medical centers throughout  
16 the United States”); Washington Indictment at ¶ 2 (“Victim Hospital operated a computer  
17 network with medical service providers’ workstations located in Pierce County, Washington)  
18 *with* Texas Indictment at ¶ 2 (“Victim Hospital operated a computer network with servers located  
19 in Collins County, Texas, in the Eastern District of Texas”); Washington Indictment at ¶ 7  
20 (referencing alleged connection between a computer at Mr. Patel’s home in South Dakota and  
21 the “Victim Hospital’s network”) *with* Texas Indictment at ¶ 7 (referencing Patel’s alleged  
22 connection to “Victim Hospital’s network’s protected computers, consisting of servers in the  
23 Eastern District of Texas and elsewhere”). That venue may also be proper in Texas because a  
24 server in the computer network is located there does not “render[] venue improper” in the  
25 Western District of Washington, when the government originally chose to bring the intentional

1 damage to a protected computer charge, and continues to allege “the entire medical record  
2 system at four [hospital] facilities crashed for thirty minutes” as a result of Mr. Patel’s alleged  
3 conduct. *See* Texas Indictment at ¶ 13. And if the government now believes that Mr. Patel  
4 committed crimes exclusively in Texas, it is unclear why the Grand Jury indicted him for conduct  
5 committed in “Texas *and elsewhere*” and for the alleged unavailability of the network to the  
6 “entire Victim Hospital system.” *Id.* at ¶¶ 7, 11 (emphasis added).

7 Further, the newly indicted aggravated identity theft charge in Texas involves conduct  
8 that was specifically referenced both in the Complaint and the Washington Indictment in  
9 connection with the intentional damage to a protected computer charge. *Compare* Texas  
10 Indictment at Count 2, ¶ 16 (“On or about August 16, 2013, within the Eastern District of Texas  
11 *and elsewhere*, the defendant . . . knowingly transferred, possessed and used, without lawful  
12 authority, a means of identification of another person, to wit, the username and password to  
13 access the Victim Hospital computer network that belonged to M.M., during and in relation to .  
14 . . . Intentional Damage to a Protected Computer”) (emphasis added) *with* Washington Indictment  
15 at ¶¶ 6-8 (“On or about August 16, 2013, Patel logged into a virtual private network (VPN) for  
16 Victim Hospital using an account in his name that established a connection between a computer  
17 in at his home in South Dakota and Victim Hospital’s network; [u]pon logging into the VPN,  
18 Patel then logged into Victim Hospital’s system using the former employee’s user account that  
19 he had reset).”<sup>4</sup>

20 The nearly identical indictments returned against Mr. Patel for the same alleged conduct,  
21 first in Washington and now in Texas, demonstrate that this case—like many others brought  
22 under the Computer Fraud and Abuse Act (CFAA)—is one for which multiple venues may be  
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25 <sup>4</sup> The Complaint makes plain that the “former employee” at issue in the Washington Indictment is the same  
“M.M.” referenced in the aggravated identity theft charge in the Texas Indictment. *See* Dkt. 6 at 9-12.

proper. The DOJ Manual for litigating the CFAA explicitly advises that prosecutors may seek waiver of venue from a defendant under such circumstances:

If no single district has proper venue for all potential counts, prosecutors can either charge the defendant in multiple districts and seek transfer to a single district **or bring all charges in one district and seek a waiver from the defendant.** Rule 20 of the Federal Rules of Criminal Procedure allows transfer of prosecution for purposes of entering a guilty plea from the district where the indictment is pending to the district where the defendant is arrested, held, or present. Similarly, **Rule 21 allows a court to transfer a prosecution for trial, upon the defendant's motion, to another district for the convenience of the parties and witnesses. Note, however, that both rules require the explicit consent and cooperation of the defendant. A defendant may also waive any objections to improper venue, either explicitly or by failing to object when the defect in venue is clear.** *See United States v. Roberts*, 308 F.3d 1147, 1151-52 (11th Cir. 2002); *United States v. Novak*, 443 F.3d 150, 161 (2d Cir. 2006).

DOJ Manual at 112 (emphasis added). Yet the government did not seek waiver from Mr. Patel in this case as recommended. Instead, it indicted Mr. Patel in Sherman, Texas after he did not agree to enter a tolling agreement on the government's terms. The government is now forcing Mr. Patel to continue this litigation in a District located over two thousand miles away from the location of his Seattle-based counsel of choice, in a city in which he has never stepped foot, and in a State in which his attorney of choice is not a member of the bar. This will substantially increase Mr. Patel's costs of defending himself with his counsel of choice and creates significant inconvenience for undersigned counsel,<sup>5</sup> whom Mr. Patel initially selected in part because of

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<sup>5</sup> Undersigned counsel is neither barred in the State of Texas nor admitted to practice in the Eastern District of Texas and will be required to apply for admission *pro hac vice* to represent Mr. Patel in the pending proceedings there. This may have constitutional significance in connection with Mr. Patel's right to privately retain counsel of his choosing. *See U.S. v. Gonzalez-Lopez*, 54 U.S. 140, 126 S. Ct. 2557 (2006). Moreover, undersigned counsel's lack of familiarity with local rules in a new jurisdiction will increase the overall cost of preparing and filing motions and will likely require consultation with local counsel in Texas (if not mandated by local rule)—again at additional cost to Patel.

1 the government's decision to file the initial charge against him in the present District. The  
2 government should not be permitted to manipulate venue to its obvious advantage in this manner.

3 Mr. Patel has previously represented to this Court that he is of limited resources. Dkt. 22  
4 at 5 (referencing Mr. Patel's limited resources in the context of the government's efforts to  
5 restrict his ability to view discovery in South Dakota to confer remotely with his Seattle-based  
6 counsel). The additional cost of sending Patel's Seattle-based defense team to represent him at a  
7 venue that is a five-hour plane ride from Seattle in both directions, and an hour drive from the  
8 closest airport, results in a "substantial balance of inconvenience" to him. *See United States v.*  
9 *Ferguson*, 432 F. Supp. 2d 559, 568 (E.D. Va. 2006) (granting motion to transfer venue and  
10 finding that trying the case in the government's chosen venue will result in "substantial balance  
11 of inconvenience" to defendants, who would be forced to absorb significant out-of-pocket costs  
12 for both travel and hotel accommodations during trial).

13 Undersigned counsel has informed counsel for the government in both Districts that Mr.  
14 Patel intends to move for transfer of the Texas Indictment back to the Western District of  
15 Washington under Rule 21(b), just as the DOJ Manual describes. In doing so, any objections Mr.  
16 Patel could ever have had to venue in the Western District of Washington will be waived. *See*  
17 DOJ Manual at 112 (citing cases). Given Mr. Patel's willingness to waive venue, the  
18 government's continued insistence upon trying the case in the Eastern District of Texas makes  
19 little practical sense. Among other things, trying this case in Sherman, Texas will be less  
20 convenient than the Tacoma, Washington location, not only for Mr. Patel and his defense team,  
21 but also for the witnesses involved—including potentially the alleged victim. Based on discovery  
22 provided thus far, most of the witnesses in this case appear to be located in or around Tacoma,  
23 Washington; Omaha, Nebraska; or Denver, Colorado, among other locations. Due to the  
24 geographic diversity of the potential witnesses in this case, many if not most of them, will likely  
25 need to fly to the location of trial, wherever it is held. Sherman is objectively less convenient



1 than Tacoma for travel purposes: according to an internet search, Sherman is located  
2 approximately sixty-six miles north of the Dallas-Fort Worth International Airport and requires  
3 an additional hour of travel from the airport to reach by car. Based on the Texas Indictment, the  
4 only connection to the Eastern District of Texas has to this case is that it is the location of a  
5 server in the alleged victim's computer network; to the defense's knowledge thus far, no  
6 witnesses are alleged to reside in Sherman, Texas. By comparison, the federal courthouse in  
7 Tacoma is under twenty-five miles from SeaTac International Airport, and several potential  
8 witnesses who work for the alleged victim hospital are located within the Western District of  
9 Washington. The government's refusal to maintain the prosecution in this District appears  
10 designed to unfairly prejudice Mr. Patel.

11 Finally, the government's claim that moving this case to Texas is necessary in order "to  
12 avoid the cost and burden of potentially parallel prosecutions" is not credible when the additional  
13 prosecution in Texas is a problem entirely of the government's own making. The jurisprudence  
14 heavily favors trying cases in the venue where a prosecution is first brought out of consideration  
15 for the prosecution's time and resources under these precise circumstances. *See, e.g., U.S. v.*  
16 *Jones*, D.C. 1967, 43 F.R.D. 511 (noting that only rarely and for good cause should a prosecution  
17 be moved in the interest of justice from the court in which it was brought and thus from the  
18 direction of management of counsel who had prepared it and carried it before the Grand Jury).  
19 The government's contention that trying this case in Texas somehow "conserve[s] resources and  
20 promote[s] efficiency[.]" when it initially selected this District for prosecution of this case, is  
21 dubious at best.

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### III. CONCLUSION

Because proceeding with the present litigation in the Eastern District of Texas will result in a “substantial balance of inconvenience” to Mr. Patel, counsel fully anticipates that this matter will ultimately return to the Western District of Washington for trial. It is plainly “in the interests of justice.” Fed. R. Crim. P. 21(b). In the meantime, Mr. Patel respectfully requests that the Court grant the government’s Motion for Leave to Dismiss the Indictment in this case, along with any other equitable remedy it may deem appropriate for him under these circumstances.

DATED this 20<sup>th</sup> day of August, 2018.

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